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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE TERMINIX INTERNATIONAL COMPANY LIMITED PARTNERSHIP and ALLIED-BRUCE TERMINIX COMPANIES, INC.,
Petitioners,

v.

MARK JACKSON and LAURIE JACKSON,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, makes an agreement to arbitrate enforceable, as a matter of federal law, provided that it is part of "a contract evidencing a transaction involving commerce." The question presented here is as follows:

Whether the Alabama Supreme Court correctly held—contrary to the view taken by most state and federal courts—that Section 2 is inapplicable to contracts otherwise involving interstate commerce if the parties did not "contemplate[] substantial interstate activity" at the time of the contract.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	6

TABLE OF AUTHORITIES

Case Page

Metro Indus. Painting Corp. v. Terminal Constr. Co., 287 F.2d 382 (2d Cir.), *cert. denied*, 368 U.S. 817 (1961) 3, 5

Statutes

Federal Arbitration Act

§ 1, 9 U.S.C. § 1 ..... 2, 3
§ 2, 9 U.S.C. § 2 ..... 2, 3, 5

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is not yet reported. It is reprinted in the appendix to this petition at 1a-4a. The order of the circuit court is not reported. It is reprinted in the appendix to this petition at 5a-8a.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on August 13, 1993. A timely petition for rehearing was denied on September 24, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

> **Validity, irrevocability, and enforcement of agreements to arbitrate**
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 1 of the Federal Arbitration Act, 9 U.S.C. § 1, provides in relevant part:

> **"Maritime transactions" and "commerce" defined; exceptions to operation of title**
>
> . . . "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

STATEMENT

This petition is being filed simultaneously with a companion petition, captioned *Allied-Bruce Terminix Cos. v. Dobson*, arising from another decision of the Supreme Court of Alabama on the same issue entered on the same

day.[1] In both cases, petitioners seek review of that court's construction of the Federal Arbitration Act (the "FAA" or "the Act"). Section 2 of the Act requires enforcement of arbitration agreements in any "contract evidencing a transaction involving commerce," 9 U.S.C. § 2, and Section 1, in turn, defines commerce to include "commerce among the several States," 9 U.S.C. § 1. In this case, as in *Dobson*, the Supreme Court of Alabama held that the FAA did not apply to a contract containing an arbitration agreement because, notwithstanding the contract's actual nexus with interstate commerce, the parties had not "*contemplated* . . . substantial interstate activity." Pet. App. 4a (citing *Metro Indus. Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382, 387 (2d Cir.), *cert. denied*, 368 U.S. 817 (1961)) (Lumbard, J., concurring) (emphasis added).

This case arises out of a home termite protection agreement between Tommie and Kelley Geohagan and petitioners Allied-Bruce Terminix Companies, Inc. ("Terminix Service") and Terminix International Company ("Terminix International"). Terminix Service is an Arkansas corporation with offices in Florida, Georgia, Mississippi, Louisiana, Arkansas, Oklahoma, and Texas, as well as in Alabama. Terminix International is a limited partnership with its principal place of business in Memphis, Tennessee. The termite protection plan provided for services to be performed by Terminix Service. Terminix International, in turn, guaranteed the terms of the plan. The contract embodying the plan expressly provided that "any controversy or claim between [the parties] arising out of or relating to the interpretation, performance or

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[1] **The caption reflects all of the parties in the court below. There are two additional individual defendants who did not participate in this appeal—George Massey and George Battle. The only corporate petitioner in this case—Allied-Bruce Terminix Cos.—has no parent company or subsidiaries.**

breach of any provision of this agreement *shall be settled exclusively by arbitration.*" C.R. 36 (emphasis added).[2]

The termite protection plan was subsequently transferred to respondents as part of their agreement to purchase the Geohagans' home. At that time, the Geohagans also presented respondents with a form prepared by one of the petitioners indicating that the home had recently been inspected and that termite damage had been discovered. C.R. 7. An attached graph specifically described the nature and extent of the damage. C.R. 8.

Respondents allege that they later discovered more substantial termite damage to their house than was reflected in the graph. In 1991, they brought an action against petitioners, alleging fraud, misrepresentation, negligence, and breach of contract. Petitioners moved to compel arbitration of the contractual claim pursuant to the arbitration clause in the contract. The trial court denied this motion, concluding that the termite protection "agreement does not have a sufficient nexus with interstate commerce activity to bring it within the coverage of the FAA." Pet. App. 6a.[3]

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[2] "C.R." refers to the certified record in the court below. The full text of the arbitration provision is as follows:

> The Purchaser and Terminix agree that any controversy of claim between them arising out of or relating to the interpretation, performance or breach of any provision of this agreement shall be settled exclusively by arbitration. Such arbitration shall be conducted in accordance with the Commercial Arbitration Rules then in force of the American Arbitration Association. The arbitration award shall be final and binding on both parties. Judgment upon such arbitration award may be entered in any court having jurisdiction.

[3] The trial court also held, in the alternative, that petitioners had waived their right to arbitration by proceeding with discovery in the case for a number of months before filing a motion to compel arbitration. (*See* Pet. App. 6a-7a.) Because of its ruling on the interstate commerce issue, the Alabama Supreme Court did not address the other issues raised by petitioners' appeal. Those issues would remain open for consideration on remand if this Court were

The Supreme Court of Alabama affirmed, relying on state law for the proposition that "[p]redispute arbitration clauses" are not enforceable. *Id.* at 2a. The court acknowledged that Section 2 of the FAA, where applicable, supersedes state law and requires enforcement of arbitration agreements as a matter of federal law, *ibid.*, but it held that Section 2 did not apply to this case because the required nexus with interstate commerce did not exist. It refused to apply a test asking whether there is a "slight nexus" with interstate commerce. *Id.* at 4a. Instead, in the court's view, the determinative question was "whether the parties to the contract contemplated, at the time they entered into the contract, substantial interstate activity." *Ibid.* (citing *Metro Industrial*, 287 U.S. at 387 (Lumbard, J., concurring)). Applying that test, the court concluded that "the FAA does not apply because there is no evidence that the Jacksons, when they entered into the termite bond, thought that it would involve substantial interstate activity." *Ibid.* Moreover, in the court's view, the "performance did not involve interstate commerce to such a degree that a reasonable person must have contemplated substantial interstate activity when they entered into the contract." *Ibid.* (citing the court's opinion in the companion *Dobson* case, issued on the same day).

REASONS FOR GRANTING THE WRIT

This case warrants the attention of this Court for all of the reasons set forth in the *Dobson* petition, which is incorporated here by reference. As petitioners argued there, the lower courts need further guidance concerning the proper approach to determining whether a given contract is covered by the FAA. In the absence of such guidance, identical arbitration agreements in identical contracts will continue to be enforceable in some jurisdictions and unenforceable in others, depending on how the Act is interpreted. Moreover, the particular approach adopted

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to reverse the ruling of the Alabama Supreme Court with respect to the applicability of the FAA to this contract.

by the Alabama Supreme Court is plainly wrong. There is no basis in the language or policies of the Act for refusing to apply it to a case where the parties affirmatively agreed to arbitrate disputes and where the transaction in fact involved interstate commerce, simply because a court finds that the parties did not subjectively "contemplate" the interstate nature of the transaction.

Accordingly, petitioners ask that the Court grant review in this case and consolidate it with the *Dobson* case for briefing and argument. In the alternative, the Court may wish to grant review in one of the cases and hold the other petition pending a ruling on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 22, 1993

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APPENDICES

APPENDIX A

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1993

1911842

THE TERMINIX INTERNATIONAL COMPANY LIMITED PARTNERSHIP and ALLIED-BRUCE TERMINIX COMPANIES, INC., a corporation

v.

MARK JACKSON and LAURIE JACKSON

Appeal from Montgomery Circuit Court
(CV-91-1874)

ALMON, JUSTICE.

The defendants, Terminix International Company Limited Partnership ("Terminix International") and Allied Bruce Terminix Companies ("Terminix Service"), appeal from the trial court's order denying their motion to compel the plaintiffs, Mark and Laurie Jackson, to arbitrate the claims stated in certain counts in an action filed by the Jacksons. A single issue is presented: whether the contract between the parties—a termite bond—contains sufficient contacts with interstate commerce to bring it within the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*

In March 1988, Mark and Laurie Jackson agreed to purchase a house in Montgomery, Alabama, from Tommy Geohagan. At the closing, Geohagan showed the Jacksons a Veterans' Administration ("V.A.") form that had been prepared by Terminix Service. This form indi-

cated that Terminix Service had inspected the house and had observed existing termite damage; a graph attached to the form specifically described the nature and extent of the damage. At the same time, Geohagan assigned to the Jacksons his rights in a termite bond that he had previously acquired from Terminix Service and Terminix International.[1] This bond contained a clause providing that any dispute arising out of or relating to the bond would be settled by arbitration.

The Jacksons later discovered substantial termite damage to their house. They brought an action against Terminix Service and Terminix International, alleging that the defendants had defrauded them by misrepresenting the nature of the termite damage referenced on the V.A. form; the complaint also included a breach of contract count. Terminix Service and Terminix International subsequently moved to compel the Jacksons to arbitrate the breach of contract claim pursuant to the arbitration clause in the termite bond. The trial court denied the motion, and Terminix International and Terminix Service appeal from that order.[2]

Predispute arbitration clauses are not specifically enforceable in Alabama. Ala. Code 1975, § 8-1-41. However, if an arbitration clause is contained in a contract that involves interstate commerce, then the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, preempts state law. Under the FAA, arbitration clauses are specifically enforceable. *Ex parte Costa & Head (Atrium), Ltd.*, 486

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[1] Terminix Service was responsible for rendering the services on the bond; Terminix International was the guarantor on the bond.

[2] Although the trial court's order is not technically a final order, this court has decided, in light of the 1988 amendments to the FAA, which provide for an immediate appeal of a ruling on a motion to compel arbitration, to treat such orders as final for purposes of appeal. *Ex parte Brice Building Co.*, 607 Ala. 132 (Ala. 1992); *A.G. Edwards & Sons v. Clark*, 558 So. 2d 358, 360 (Ala. 1990).

So. 2d 1272 (Ala. 1986); *Ex parte Shamrock Food Service, Inc.*, 514 So. 2d 921 (Ala. 1987).

Terminix International and Terminix Service argue that the termite bond need only have the slightest nexus with interstate commerce for the FAA to apply. They cite *Costa & Head, Maxus v. Sciacca*, 598 So. 2d 1376 (Ala. 1992), and *Ex parte Brice Building Co.*, 607 So. 2d 1321 (Ala. 1992), to support this proposition.[3] Terminix International and Terminix Service argue that the termite bond does have at least a slight nexus with interstate commerce, for the following reasons: Terminix International has no office in Alabama, but is a Delaware limited partnership with its principal office in Memphis, Tennessee; Terminix Service is an Arkansas corporation; and the bond, because it obligates both companies to retreat the home and repair any damage that results from the infestation of termites, contemplates that at least some of the products used to perform these services will be obtained from out-of-state sources.

The Jacksons respond with the argument that the cases cited by the appellants concern construction contracts, which almost inevitably affect interstate commerce because of the presence of out-of-state suppliers and subcontractors. They argue that the narrower standard enunciated in *Ex parte Warren*, 548 So. 2d 157 (Ala. 1989), cert. denied, 493 U.S. 998, 110 S.Ct. 554, 107 L.Ed.2d 550 (1989), should control this case.[4] In *Warren*, this

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[3] This Court recently overruled the cases applying the *Costa & Head* standard to the extent that they utilized the "slightest nexus" standard to determine the enforceability of arbitration agreements. *Ex parte Jones*, [Ms. 1920249, July 16, 1993] —— So. 2d —— (Ala. 1993); *Continental Grain Co. v. Beasley*, [Ms. 1920241, July 16, 1993] —— So. 2d —— (Ala. 1993).

[4] In *Ex parte Jones* and *Continental Grain*, *supra* fn. 3, this Court exclusively adopted the *Warren* standard for analyzing whether contracts have a sufficient involvement with interstate commerce to invoke the FAA.

Court held that in the context of a sale of consumer goods that occurred wholly within the state, the test was not whether the contract had a slight nexus with interstate commerce, but whether the parties to the contract contemplated, at the time they entered into the contract, substantial interstate activity. See *Metro Industrial Painting Corp. v. Terminal Construction Co.*, 287 F.2d 382, 387 (2d Cir.), *cert. denied*, 368 U.S. 817, 82 S.Ct. 31, 7 L.Ed.2d 24 (1961). See also *Ex parte Williams*, 555 So. 2d 146 (Ala. 1989); *Burke County Public Schools Board of Education v. Shaver Partnership*, 303 N.C. 408, 279 S.E.2d 816, 822 (1981). The Jacksons assert that they believed the termite bond was a local contract when they entered into it, and that therefore the arbitration clause has no effect. The Jacksons alternatively argue that the contract does not have a slight nexus with interstate commerce even under the broader test.

This Court holds that the termite bond does not involve interstate commerce under the *Warren* standard. Under the *Warren* test, the FAA does not apply because there is no evidence that the Jacksons, when they entered into the termite bond, thought that it would involve substantial interstate activity. The performance did not involve interstate commerce to such a degree that a reasonable person must have contemplated substantial interstate activity when they entered into the contract. See *Allied-Bruce Terminix Cos. v. Dobson*, [Ms. 1920473, August 13, 1993] —— So. 2d —— (Ala. 1993).

For the foregoing reasons, the trial court properly denied defendants' motion to compel arbitration of the breach of contract claim.

AFFIRMED.

Houston, Steagall, and Ingram, JJ., concur.

Kennedy, J., concurs in the result.

APPENDIX B

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

CV-91-1874-TH

MARK JACKSON and LAURIE JACKSON,
Plaintiffs,

vs.

THE TERMINIX INTERNATIONAL COMPANY LIMITED PARTNERSHIP, *et al.*,
Defendants.

ORDER

This matter came to be heard upon the defendant's Motion to Compel Arbitration and to Stay Litigation Pending Arbitration and the plaintiffs' response to the same. The Court scheduled a hearing on said motion for May 4, 1992. Appearing for the plaintiffs' was the Honorable Ronald W. Wise and for the defendants, the Honorable Dorothy Littleton. Subsequent to the hearing the defendants submitted a Supplemental Brief in Support of Motion To Compel Arbitration and To Stay Litigation Pending Arbitration and the plaintiffs responded to the same.

Based upon the pleadings and the affidavit submitted by the plaintiff, the Court is of the opinion that the defendant's Motion to Compel Arbitration and to Stay Litigation Pending Arbitration should be denied. Based upon the pleadings and statements by counsel, the Court finds that the defendants are qualified to do business in Alabama and that the individual defendant is a resident of

Montgomery, Alabama. Terminix Service has an office in Montgomery, Alabama, and performs termite treatment and issues termite letters and protection plans to residents in the Montgomery area. The Terminix International Company, a limited partnership, is a Delaware limited partnership with its principal offices in Memphis, Tennessee. Terminix International guaranteed performance of the termite protection plan on plaintiffs' residence issued by Terminix Service. The plaintiffs had a termite letter and assumed a termite bond from a previous owner for his new residence in Montgomery, Alabama. The pleadings show that the Termite Protection Plan states that "Terminix will provide repairs to the home upon the discovery of new damage." At the bottom left hand corner of the Termite Protection Plan it states "Terminix Service, P.O. Box 7028, Montgomery, Alabama 36107, 205-265-0233." Any work that was to be performed by any of the defendants under the breach of contract claim would definitely be performed in the State of Alabama on a residence located in Montgomery, Alabama. The court finds that the agreement does not have a sufficient nexus with interstate commerce activity to bring it within the coverage of the FAA. *A. J. Taft Coal Company, Inc., v. Sam Randolph, et al,* Case No. 1910413 (July 31, 1992). This is true even if one assumes that it was Terminix International, Inc., as opposed to Allied Bruce Terminix Companies, Inc. (Terminix Service), who assumed said responsibility. It appears as if a jury could easily find that said guarantee on the breach of contract claim for the repair was guaranteed by Terminix Service based upon the "termite protection plan." This is due to the language on said "termite protection plan."

Further, the Court finds that even if the arbitration clause was enforceable as to that one cause of action with that one defendant, the defendants have waived any right to arbitration which they may have had. The Court makes this finding based upon the totality of the cir-

cumstances in that the defendants have acted inconsistently with the arbitration right and, as a result, have prejudiced the plaintiffs. The Complaint in this case was served in August, 1991, and the defendants did not file their Motion to Compel Arbitration and Stay Litigation until March 30, 1992, some seven months later. During this period of time the defendants filed Requests for Admissions, Interrogatories, Request for Production of Documents and took two depositions totaling over 100 pages. Further, the plaintiffs have taken three depositions consisting of over 300 pages. There is no question that the defendants have acted inconsistently with this arbitration right and the plaintiffs have incurred expenses by participating in the litigation process. *S&H Contractors, Inc., v. A. J. Taft Coal Co.*, 906 F.2d 1507 (11th Cir. 1990).

Therefore, the Court finds that it is not clear that Terminix International Company solely guaranteed repair of the home if new termite damage was found. The "termite protection plan" also refers to "Terminix" and "Terminix Service." This is a jury question. Second, the court finds that this is but one cause of action contained in the Complaint and that the plaintiffs rely solely on the breach of contract claim in asking for arbitration. Third, the court finds that even if Terminix International, with its business located in Tennessee, is the only guarantor under the contract claim for the repair of the home, that does not in and of itself provide a sufficient nexus to bring it within the FAA. *See, J. A. Taft Coal Company, supra.* Fourth, the court finds that the defendants have waived any rights to arbitration they may have had under the agreement. Therefore, it is ORDERED, ADJUDGED AND DECREED that the defendants' Motion to Compel Arbitration and Stay Litigation Pending Arbitration is hereby DENIED based upon the evidence submitted and the pleadings in this case and testimony presented at oral argument.

DONE 17th day of August, 1992.

/s/ H. Randall Thomas
H. RANDALL THOMAS
Circuit Judge

Ronald W. Wise
Dorothy Littleton

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

SEPTEMBER 24, 1993

1911842

THE TERMINIX INTERNATIONAL COMPANY LIMITED PARTNERSHIP and ALLIED BRUCE-TERMINIX COMPANIES, INC., a corporation

v.

MARK JACKSON and LAURIE JACKSON

(Montgomery: CV-91-1874)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

ALMON, J.—Houston, Steagall, Kennedy and Ingram, JJ., concur.